

THE *COSTA CONCORDIA* TRAGEDY: A LEGAL LIFE JACKET TO AVOID DROWNING IN INTERNATIONAL WATER. PART II: APPLICABLE LAW

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Most of those claiming damages as a result of the *Costa Concordia* accident likely will be litigating in Italian courts. However, there may be US citizens who will be permitted to pursue their claims in Florida or other tribunals in the United States. Wherever the dispute is tried, it is very likely Italian law will apply.¹ Italian domestic law, however, is often linked to International Law. The interplay between the two sets of law opens up the possibility of different approaches that cannot be completely reconciled or predicted. Under Italian Law, both the *Tourism Code* and the *Naval Code* will be in play. On the International Law side, two important treaties, the Brussels Convention and the Athens Convention,² must be considered.

Article 34 of the Italian Tourism Code expressly mentions cruise contracts³ among the agreements to which the code will apply. Articles 44, 45 and 47 of the Code identify three different types of injury from which cruise passengers can recover: personal injury, non-personal injury and damages arising from a spoiled vacation (i.e. “*danno da vacanza rovinata*”).⁴ Under the Tourism Code, recovery of personal injury and non-personal injuries can be limited but such limitation cannot be below limits provided by international treaties. Because the Code does not mention any specific treaty, any relevant treaty to which Italy is a party may be applicable.

The Tourism Code, however, has express statute of limitation provisions which will bar any action three years after the incident for personal injuries,⁵ and after one year for non-personal injuries. As far as damages arising from a spoiled vacation, the injury includes the disruption of a peaceful vacation⁶ as well as a scheduled vacation the passenger could not

1. The trial court in *Scimone* opined Italian law “may apply to this case, [but] the fact Italy is a civil law country does not conclusively demonstrate that there is a significant conflict between U.S. and Italian law”. *Scimone, et al. v. Carnival Corp.*, et al., Order Granting in Part and Denying in Part Motion to Dismiss for Forum Non Conveniens, No. 12-26072, Circuit Court for Miami-Dade County at 2 (7/19/13) at 5. On the other hand, the *Abeid-Saba* trial court acknowledged the applicability of Italian law but hinted in several of its Findings of Fact it could pose problems in a proceeding in the U.S. *Abeid-Saba, et al. v. Carnival Corp., et al.*, Order Granting Defendants’ Motion to Dismiss Based on the Doctrine of Forum Non Conveniens, No. 12-26076, Circuit Court for Miami-Dade County at (see Findings 39, 40, 51, 70 and the analysis of Count III) (7/19/13).

2. Claudio Perrella “The Costa Concordia Accident: The Liability Issues from an Italian Perspective” [2012] Forwarderlaw.com http://www.forwarderlaw.com/library/view.php?article_id=811&highlight=costa (Last visited July 15, 2014).

3. Article 32 of the Italian Tourism Code states that Title I provisions apply to the type of touristic packages provided in article 34. Article 34 defines the concept of touristic package providing a list of services that qualify; “touristic cruises” are expressly mentioned.

4. Codice del Turismo, Art. 47. The concept will be further analysed in Part III.

5. Codice del Turismo, Art. 45 §3.

enjoy at all.⁷ Damages attributed to a *spoiled vacation* are different and distinct from those arising from the more typical personal and non-personal injuries. Applying this aspect of the Italian Tourism Code means the *Concordia* defendants, if they are held responsible for the accident, will owe spoiled vacation damages to all 3,206 passengers on the sunken ship.

The *Concordia* defendants, jointly and severally, confront liability not only as the package tour provider but also as the ship owner. Therefore, the provisions of the Italian Naval Code applicable to a cruise carrier will be applicable in deciding the defendants' liability. Article 409 of the Italian Naval Code provides that the carrier is liable for passenger injuries suffered "from the beginning of boarding to the end of de-boarding."⁸ Because the *Costa Concordia* was cruising when the accident occurred, the incident meets the "from the beginning of boarding to the end of de-boarding" requirement of the Naval Code. Consequently, Costa Crociere and the other defendants should be liable for the injuries suffered by the passengers.

Article 274 of the Italian Naval Code provides an alternative theory of the defendants' liability. Under the section, the ship owner is liable for negligent acts committed by the commander and the crew. Therefore, any negligence or recklessness of Captain Schettino the *Concordia* officers or its crew will be attributable to Costa Crociere and the other defendants.⁹

Beyond the likely liability of the defendants under the Italian Tourism Code and the Naval Code, it is appropriate to consider the effect of international law on the *Concordia* accident. Costa Crociere's passenger contract specifically identified the applicability of relevant international treaties,¹⁰ two of which, the Brussels Convention¹¹ and the Athens Convention,¹² may be relevant. Both treaties provide liability caps that limit cruise passenger recovery. The treaties' liability limitations are different from each other and vary according to the type of injury suffered (i.e. personal, non-personal and other forms of injury).

Predicting which treaty the Italian court will apply to the *Concordia* incident is complicated. Italy never signed the Athens Convention. Nevertheless, the EU declared the Athens Convention mandatory for all the member states¹³ through Regulation 329/2009. The EU gave its members a deadline to adopt domestic legislation reproducing the content of the Athens convention to insure every state had an internal law mirroring the provisions of the Athens Convention. However, the EU deadline was December 31, 2012, and the *Costa Concordia* accident occurred eleven months beforehand. Moreover, Italy, along with many other member states, has failed to implement an adopting regulation. While it may appear the Brussels Convention should apply because the condition precedent set by the Italian legislature for its abrogation was never fulfilled, one can be sure parties favouring application of the Athens Convention will mount a vigorous argument. For instance, they may argue the

6. Ezio Guerinoni "Disciplina dei Contratti Turistici e danno da Vacanza Rovinata," IPSOA, 2009, P. 171.

7. Massimiliano di Pirro "Danno da Vacanza Rovinata," La Tribuna, 2011, p.89.

8. Codice Navale, Art. 409; Antonio Lefebvre d'Ovidio, Gabriele Pescatore, Leopoldo Tullio "Manuale di Diritto della Navigazione" 11th Ed., Giuffrè Editore, 2011, p.438.

9. As affirmed in Tribunale Reggio Emilia, I, n. 2555, February 21th 2004.

10. Costa's general terms and conditions (2012) §1.2

11. Adopted by Italy and introduced in the Italian Legal System by the Law n. 1084 (1977).

12. *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea*, 1974, <http://www.admiraltylawguide.com/conven/passengers1974.html> (last visited on 05/23/2014).

13. Italy is a state member of the E.U.

Italian government's negligence in failing to adopt the implementing regulation should not bar the relevance of the Athens Convention. Moreover, they can argue that the EU regulation was immediately applicable since it expressly stated that "This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*. It shall apply from the date of the entry into force of the Athens Convention for the Community, and in any case from no later than 31 December 2012¹⁴." In the alternative, the parties may advance the view that the EU regulation mandating the Athens Convention was self-executing and, as such, effectively made it the law in Italy.¹⁵

Forecasting what laws and treaties will apply to the *Costa Concordia* dispute is far more than an academic exercise. The legal principles the Italian courts adopt to adjudicate the dispute will affect the plaintiffs and the defendants significantly from a financial perspective because of stark differences on the limits on liability.

Under the Italian Naval Code, the carrier is liable up to €6.19 (about \$8.30) per Kg of luggage lost by a passenger.¹⁶ As to personal injury, there is no limit as to damages recoverable by an individual (since the Code is silent as to this type of liability). Finally, any liability limitation will not be applied if the accident was caused intentionally or through gross negligence¹⁷; allegations likely to permeate the pleadings of *Concordia* plaintiffs.

Under the Italian Tourism Code¹⁸, the liability limits are the same as those provided by the applicable international conventions. Therefore such limits will be linked to the decision as to which of the two conventions will be declared the law of Italy. The differences between the liability caps of the two conventions are substantial. Under the Athens Convention, the defendants confront a liability maximum of \$640,000 per person for personal injury (and not less than \$27,000 in the case of death), \$5,500 for damages to things, and \$3,500 for loss or damage of the luggage. However, if the Brussels Convention applies, plaintiffs may recover from *Costa* a maximum of \$768,000 per person for personal injury, \$31,000 for damages to things and \$77,000 for other damages. Obviously, plaintiffs are likely to push for the Brussels Convention and its potentially higher returns while the defendant companies will urge application of the Athens Protocol.

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14. Regulation (EC) No 392/2009, Art. 12.

15. If the EU regulation contains the rules that it aims to implement in the Member States's system, and the Member States merely need to adopt it with their domestic law, such regulation is considered self-executing and it is immediately applicable in the Member State. G. Tesauro, *Diritto dell' Unione Europea*, Padova, 2010, p. 202; Giampaolo Parodi, *Le Fonti del Diritto. Linee Evolutive*, GIUFFRÈ, 2012, p.46. It can be argued that because the regulation referred to a specific set of rules (i.e. the Athens Convention"), it contained all the rules that it aimed to implement and therefore it should be considered self-executing and immediately applicable in Italy.

16. Italian Naval Code, Art. 412.

17. Italian Constitutional Court, 26 maggio 2005, n. 199.

18. Codice del Turismo, Art. 44-45.